IN THE SUPREME COURT

OF THE

UNITED STATES

W. W. MONTAGUE AND COMPANY, a corporation, et al.,
Plaintiffs in Error,
vs.
EDWARD S. LOWRY et al.,
Defendants in Error.

No. 660.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

I.

Statement of Case.

This is an action at law brought by the defendants in error under section 7 of the Act of Congress of July 2nd, 1890 (26 Stats. 209, c. 647), sometimes called the Sherman Anti-Trust Act, to recover damages from the plaintiffs in error for injuries said to have accrued to the defendants in error from an alleged violation of the provisions of the Act in question, together with attorney's fees as provided by the Act.

Section 7 gives the measure of recovery at law and is as follows:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 furnish the test of liability, and are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.
>
> "Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.
>
> "Sec. 2. Every person who shall monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or

> with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding a year or by both said punishments, in the discretion of the Court."

It may be conceded that the plaintiffs in error, at the time of the alleged grievances, were members of a voluntary association known as the "Tile Mantel and Grate Association of California". The grievances in question—the injuries alleged to have been done within the purview of Section 7—need not detain us, for no question is made on this proceeding in error as to the amount of damages, $500, assessed by the jury against plaintiffs in error and trebled by operation of law, according to the terms of the Act. Plaintiffs in error have not deemed it important to go into the question of the alleged injury and the alleged damages in this proceeding. It may be assumed, then, that an injury of some kind within the contemplation of the Act was suffered by defendants in error to the extent of the damages as fixed by the jury. The Writ of Error has been sued out here mainly to try the question of liability —whether the voluntary association formed by the plaintiffs in error is obnoxious to the provisions of the Act of Congress; and incidentally whether the action of the Court was justifiable in mulcting plaintiffs in error in the sum of $750 for attorney's fees in a litigation where the whole cause of action was found by a jury to be worth no more than $500.

The character of the voluntary association in question is exhibited by its Constitution and By-Laws, which may be found at pages 47-52 of the Transcript. Such voluntary associations, among people engaged in mercantile pursuits, are familiar enough in this country and are regarded favorably in the law, as indicated by judicial decision in this country and as recently as the cases of Hopkins and Anderson, reported in 171 U. S. pages 578 and 604, respectively. The Constitution and By-Laws of the Tile, Mantel and Grate Association, as printed in the record, exhibit a familiar and useful type of mercantile organization. There are two sections, however, of Article III of the By-Laws upon which the claim of statutory liability is principally rested,—sections 7 and 8, found at pages 51-52 of the Transcript. They are as follows:

> "Sec. 7. No dealer and active member of this Association shall purchase, directly or indirectly, any tile or fire-place fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this Association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this Association, under penalty of expulsion from the Association."
>
> "Sec. 8. Manufacturers of tile or fire-place fixtures or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the 'Tile, Mantel and

Grate Association' of California shall forfeit their membership in the Association."

Do these sections bring the plaintiffs in error within the Act of Congress? That is the principal matter on this Writ of Error.

II.

Assignment of Errors.

The assignment as referred to the action of the Court in allowing an attorney's fee against the plaintiffs in error of $750 has been mentioned in the statement of the case. It will be considered later. The other assignments of error are mere expressions, various in form, of the central proposition that the voluntary association in question does not fall within the inhibition of the Act of Congress; and this is the first and principal question which the plaintiffs in error will present on this argument.

III.

The voluntary association known as the Tile, Mantel and Grate Association of California is not obnoxious to the provisions of the Sherman Anti-Trust Act.

It will be observed that the membership of the association is made up of active members and non-resident members; the active members are those engaged in business in San Francisco, or within a radius of 200 miles of San Francisco, not being manufacturers—in

a word the local dealers; the non-resident members are the manufacturers of tiles and fire-place fixtures throughout the United States. As a matter of fact there are no resident manufacturers of these commodities, so that the term non-resident is peculiarly applicable to those members who are not active members; that is to say, to the manufacturers. (Trans., p. 95.)

Now, then, it is provided in section 7 of Article III of the By-Laws (Trans., p. 51) that the dealers, members of the association, shall not purchase any of the articles in question from manufacturers who are not members of the association; and conversely it is provided in section 8, next after section 7, that the manufacturers shall not sell any of the commodities in question to any persons not members of the association. It is further provided in section 7, *supra,* that the dealers—that is to say, the active and local members—shall not sell "any unset tile for less than list prices to "any person or persons not a member of this associa-"tion". These two things, easily separable in thought and discussion—namely, the sale of unset tile by the local dealers, and, next, the purchase and sale of the designated commodities by the local dealers and the non-resident manufacturers, respectively—are the matters to be looked to in determining whether this voluntary association is an illegal combination or monopoly within the Sherman Act. And first, we take up the transactions between the local dealers and the non-

resident manufacturers, with special reference to the point that such dealers are not to make purchases from manufacturers not members of the association, and that such manufacturers in their turn, are not to make sales to dealers other than those who are active members of the association, carrying on business within the local limits indicated. Is there anything illegal in a combination or association acting upon such a rule or requirement as that? We say there is not.

On the policy and construction of the Act of Congress in general there is a full discussion in the *Trans-Missouri case* and in the *Joint Traffic case,* 166 U. S. 290, and 171 U. S. 505. Those cases hold that contracts or combinations in restraint of trade between the states are prohibited by the statute, without regard to the quality of the restraint, be it reasonable or unreasonable. They were concerned with agreements made by competing railway companies for the purpose of arriving at freight and passenger tariffs by convention as distinguished from competition; and powerful arguments were made in favor of the apparent restraint imposed by such agreements as protecting masses of capital invested in railway enterprises from the destructive consequences and dishonest practices of rate wars and ruinous competitions. But the Court ruled that this consideration was not relevant; that the statute must be given a somewhat literal and unqualified reading; and that any restraint of trade was within

the reach of the statute, and that agreements or combinations tending to stifle competition operated a restraint of trade within the statutory prohibition. It was further considered by the Court, as also in later decisions, that the restraint contemplated by the statute, though not qualified by any regard to its character as being reasonable or unreasonable, must nevertheless be direct and immediate and substantial, as distinguished from remote, incidental, indirect and insignificant. The restraint condemned by the *Trans-Missouri case* and the *Joint Traffic case* was direct and immediate in a very obvious sense, for it found expression in an endeavor to fix prices or rates by an arbitrary convention, to the exclusion of the play of the law of competition.

It must be noticed, however, in the case at bar, so far as the transactions between the dealers and the manufacturers are concerned, that the association fixes no tariffs or prices whatever; and it must be observed generally that the association itself does no business (See Constitution, *in loco;* Testimony, Trans., p. 77). Our point is, that it is lawful for a man to decline to work for another man or class of men, or to do business with another man or class of men, as he sees fit; and what is lawful for one man to do in this regard, several men may agree to act jointly in doing, and may make express and simultaneous declaration of their purpose. The lawfulness of a provision as between dealers and

manufacturers, such as is contained in the Constitution and By-Laws of the plaintiffs in error, is impliedly recognized in the *Hopkins case,* 171 U. S. 578, and, as we think, is aptly recognized and approved in the *Anderson case,* 171 U. S. 604. We cite also to the same point:

U. S. v. *Greenhut,* 51 Fed. 205;
In re Greene, 52 Fed. 104;
U. S. v. *Nelson,* 52 Fed. 646;
Dueber Mfg. Co. v. *Howard Co.,* 55 Fed. 851;
S. C. in error, 14 C. C. A. 14;
Gibbs v. *McNealy,* 102 Fed. 594;
Steamship Co. v. *McGregor,* L. R., 23 Q. B. 598;
Bohn v. *Hollis,* 54 Minn. 223.

Within these authorities and on a view of the Constitution and By-Laws of the association in question, it will appear that the provisions touching transactions between dealers and manufacturers are not obnoxious to the Act of Congress, and it will appear further that the association in question has none of the elements of a monopoly. Indeed, the object of the association is said to be, to unite all acceptable dealers and all American manufacturers (Trans., pp. 47-48). It is true (Trans., p. 48) that the dealers are required by the Constitution, section 1, Article I, to have an established business with not less than $3,000 worth of stock. The existence of the established business is part of the implication of the term dealer. The requirements as

to the amount of stock might be urged as a limitation upon the character of the association if it were not for the fact, as to which there is no conflict of evidence, that this requirement was disregarded and abandoned. (Trans., p. 73.) As the dealers or active members of the association are local dealers, it results that the association is open to every dealer; and it is made open to every manufacturer. It is not easy to understand how an association can be in restraint of trade or take on the features of a monopoly when its doors are wide open for every dealer and every manufacturer without distinction and when the association itself, as between the dealers and manufacturers, makes no attempt to fix prices, and, as an association, does no business (Trans., pp. 150, 151, 152).

The idea seemed to make a lodgment in the mind of the learned Circuit Judge that there was some analogy between this case and the case of a direct tax imposed by way of license in a given State upon drummers entering that State for the purpose of transacting inter-state commerce. The point of the analogy must be in the assumed likeness of relation between the tax imposed upon the drummer, and, in the case of the association here, the entrance fee of $10 required of the non-resident manufacturer. (Trans., p. 48.) It is very true that in the *Robbins case,* 120 U. S. 489, the taxation of drummers engaged in inter-state commerce was held to be in excess of the competency of the State

Legislature. But the tax there, in the shape of a license exacted of the drummer, was manifestly direct and immediate, and imposed with peculiar and exclusive reference to the circumstance that the drummer was engaged in commerce, it so being that the commerce was inter-state in character. We think, with great respect to the learned Circuit Judge, that the extension of this doctrine to the case of an entrance fee paid by a non-resident member of an association is somewhat strained and fanciful. No dues are required of the manufacturer, nothing beyond an entrance fee of $10; but even if he were required to pay dues in addition to his entrance fee, what then? The direct and immediate purpose of these fees and dues, as we all know, is to meet the incidental expenses of the association—like room rent, janitor's service, lights, fuel, stationery, and the like. There is no reference in the matter of these fees and dues to inter-state commerce, except in the most remote, incidental and trifling way (*Trans-Missouri* and *Joint Traffic cases, supra; Hopkins* and *Anderson cases, supra*).

This brings us to the second thing in sections 7 and 8 of Article III of the By-Laws (Trans., pp. 51-52), namely, the matter of the sale by the local dealers of *unset* tile. It is provided, as already pointed out, that the local dealers shall not sell any unset tile for less than list prices to non-members. Here is an element of convention as to prices—the fixing of prices by an understanding, so far as the quotation of prices to non-

members is concerned. Does this present the difficulty dwelt upon in the *Trans-Missouri* and *Joint Traffic cases* of substituting convention for competition in the ascertainment of the prices of commodities? And if it does, is the matter of convention, as distinguished from competition, of any importance at all in the transactions of local dealers in unset tile in a case concerned with a Federal Statute?

A word of explanation here as to unset tile and list prices: The tile, as shipped to California by the manufacturers, and before it is set up, around a grate, for example, or in a bath room, is called unset tile (Trans., p. 71). This is the commodity, this unset tile, as to which there is inter-state trade or commerce between the non-resident manufacturer and the local dealer. Unset tile is very seldom sold by the local dealer to a consumer in the local market (Trans., p. 72). Now, then, about list prices: An Eastern manufacturer, like the American Encaustic Tile Company, will get up a list of prices for its tile. It sells the tile to a San Francisco dealer, not at that price, which is a sort of maximum or point of departure, but at a lower price which is figured by subtracting from the maximum or list price certain discounts allowed to the local dealer called trade discounts (Trans., p. 72). The association in question, in aid of the provisions of section 7, *supra,* concerning the sale of unset tile at list prices to non-members, adopted the list price of the American Encaustic Tile Company (Trans., p. 72). In a word, a

San Francisco man, not a member of the association, who went to one of the local dealers to buy unset tile, would be charged the top figure or list price, where a member of the association in San Francisco, buying from one of the dealers, would be given the benefit of the discounts. It is important to recur again to the character of the dealers who are members of the association, as being local dealers, doing business in San Francisco or within a radius of 200 miles thereof. (Trans., pp. 47-48.) The point of this is, that the transactions in unset tile at list prices under section 7, *supra,* are local transactions, intra-state transactions, in no respect taking on the quality of inter-state commerce.

Now we make two points: First, that the transactions in unset tile at list prices being purely local, are not within the purview of the Act of Congress, and to this we cite the late case of *Addyston Pipe & Steel Co.* v. *U. S.,* 175 U. S. 211. The next point is, assuming merely for argument's sake, and only that, the transactions in unset tile to be along the line of inter-state commerce,—those transactions are so trifling, incidental and remote in their bearing upon inter-state trade and commerce as to be what mathematicians call negligible quantities which may be left out of consideration without impairing the general result. And they are governed by the rule laid down in the *Trans-Missouri case,* the *Joint Traffic case,* the *Hopkins* and

the *Anderson cases,* that transactions which are related to inter-state trade or commerce only in a trifling, incidental or remote way, will not operate to bring an agreement or association within the interdict of the Act of Congress. The utterly insignificant part played by the sale of unset tile at the hands of local dealers, whatever the price be, list or otherwise, is made plain by the following reference to the uncontradicted evidence:

"It was so insignificant that no account was kept of "it. * * * One per cent. would be a very conser- "vative estimate" (Trans., p. 74). "The percentage "was insignificant" (Trans., p. 77). Again, "so small "that we took no notice of it. * * * No difference "at all" (Trans., p. 78). Again, "less than one per "cent. of the total is sold unset". * * * "It is so "little we could hardly state it" (Trans., p. 73).

IV.

As to counsel fees.

The record shows that two witnesses testified, at the call of counsel for defendants in error, as to what a reasonable attorney's fee for the case in hand would be. It was not necessary to call witnesses, for the Court, as has often been said, is quite able to determine what a reasonable counsel fee would be, and in point of fact, having presided at the trial, is better qualified to pass upon this question than two or three witnesses who are brought in to answer a somewhat vague and general

hypothetical question. But, however this may be, the witnesses themselves testified that *the amount of the verdict* did not enter as an element into their judgment as to the attorney's fee (Trans., p. 87). It follows from this somewhat peculiar view of things that if a set of men are sued at law under section 7 of the Sherman Act for alleged damages, where the damages in fact did not exceed one dollar, and are so determined by the jury, an attorney's fee may be charged up against the defendants, a hundred or a thousand times greater than the cause of action or injury in controversy. A group of men may be haled into court upon a claim for damages of only merit enough to support a verdict in some nominal amount, and may be taxed in attorney's fees *ad libitum* for resisting an unfounded claim. Take the case at bar, for instance; the defendants in error demanded of the plaintiffs in error the payment of $10,000 by way of damages, and that such damages should be trebled. Plaintiffs in error refused to recognize that claim. Were they right? The jury have said that they were, for the verdict establishes the fact that the defendants in error demanded of the plaintiffs in error $9,500 more money than they were entitled to, or, in other words, demanded excessive damages, twenty-fold excessive in degree. Are the defendants in error to be taxed $750 attorney's fees for making such a resistance, with such results, to such an exorbitant demand? The attorney fee is 1½ times greater than the damages allowed; in other words, the attorney's

fee is 1½ times greater than the entire cause of action. It should certainly, we submit, be revised by this Court. This point is secondary and incidental, although, we think, obviously well taken. The main point, upon which we go to the Court with confidence, is that no case was made against the plaintiffs in error within the terms of the Act of Congress.

Respectfully submitted,

WILLIAM M. PIERSON,
Attorney for Plaintiffs in Error.